Kesavan a/l Petchayo @ Balakrishnan v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–05–48 OF 1999

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

22 JULY 2002

Criminal Law *— Dangerous Drugs Act (Malaysia) — s 39B — Drug trafficking — Samples of drugs seized analyzed by chemist — Chemist not adverting to weight of samples taken for analysis — Whether serious misdirection occasioned thereby*

Evidence *— Presumption — Drug trafficking — Whether trial judge erred in invoking presumption of trafficking based on presumption of possession — Dangerous Drugs Act 1952 s 37(d), (da)*

Evidence *— Statement — Admissibility — Statement made by accused to police officer — Police officer not recording such statement in any document whatsoever — Police officer not reporting such statement to superior officer — Police officer testifying of such statement for first time in trial court — Whether statement admissible — Whether admissibility of such statement could be sustained on the basis of police officer's credibility and demeanor as witness — Whether trial judge ought to have treated such statement with utmost caution*

Evidence *— Statement — Admissibility — Statement technically admissible though its prejudicial effect far outweighed its probative value — Whether trial judge had discretion to exclude statement — Whether trial judge had correctly exercised his discretion*

The appellant was convicted and sentenced to death in the High Court for drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the Act'). He appealed against the conviction. Counsel for the appellant attacked the conviction on three grounds. As to the first ground, counsel complained that the chemist did not advert to the weight of the samples he took for purposes of carrying out his qualitative analysis of the substance in question. The second ground concerned the admissibility of a statement allegedly made by the appellant immediately upon being accosted by the police. The prosecution alleged that immediately upon being accosted by the police and the drug filled packages removed from his possession, the appellant fell at the feet of a police officer, (PW3) wept, pleaded for help and said that the packages did not belong to him. The trial judge admitted this evidence. The appellant argued this was an error by the trial judge. The prosecution, in reply, submitted that PW3 was found to be a credible witness. This was through the trial judge's observation of his demeanor. With regard to the third ground, counsel submitted that the trial judge had erred by presuming possession under s 37(d) of the Act to establish the presumption of trafficking under s 37(da).

Held, setting aside the conviction under s 39B and substituting therefor a conviction under s 12(2) punishable under s 39A(2) of the Act:

(1) The first ground of appeal was devoid of merit as the evidence sufficiently established beyond reasonable doubt that for the purpose of analysis, a sufficient sample was taken of the substance in question in order to establish that it was indeed heroin and monoacetylmorphine (see p 214E).

(2) PW3 had not referred to the alleged statement made by the appellant in any document whatsoever. He had not mentioned it in his police report or to his immediate superior. This evidence by PW3 was of first impression. It was incumbent upon the trial judge to have approached such statement with utmost caution. Although the deputy public prosecutor sought to sustain the trial judge's point on admissibility by pointing out that the trial judge had found PW3 a credible witness through observation of his demeanor, impressions as to demeanor of a witness must be critically tested against the totality of his (the witness's) evidence. Demeanor is not always the touchstone of truth. It is only one ingredient in arriving at a finding of credibility (see pp 214G–H, 215B–D); *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 followed.

(3) Nowhere in his judgment did the trial judge warn himself of the necessity of approaching with caution such a first disclosure as was made in the present case. Whilst the evidence was technically admissible, its prejudicial effect far outweighed its probative value. The evidence was technically admissible because on the facts, it was difficult, if not impossible for PW3 to have administered a caution to the appellant before he made the impugned statement, it being assumed that the appellant was under arrest at the material time and thus entitled to a caution under s 37A of the Act (see p 215D–F).

(4) The trial judge had discretion to exclude the impugned statement on the ground that its prejudicial effect outweighed its probative value (see p 215F–G); *Noor Mohammad v R* [1949] AC 182 and *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 followed. Having carefully scrutinized the judgment, the Court of Appeal did not find the kind of analysis as stated in *Tengku Mahmood v Public Prosecutor*. The Court of Appeal was also unable to discern any direction by the trial judge unto himself that he had addressed the matter and the reasons for exercising his discretion in any particular way (see p 216C–D).

(5) In the instant case, the purpose for which the evidence was sought to be admitted was to prove that the appellant knew that the packages he held contained a dangerous drug. There was abundant evidence to invoke the presumption under s 37(d) of the Act and even without the aid of the presumption, the

prosecution could still easily prove possession. Therefore although the statement was technically admissible, the purpose for which it was sought to be admitted was of little consequence in the light of the other evidence. Accordingly, this was an appropriate case where the trial judge should have exercised his discretion vested in him and excluded the statement as being contrary to justice on the facts (see p 216D–F).

(6) It was clear from the judgment that the trial judge had directed his mind to the presumption under s 37(d) as establishing possession by the appellant of the dangerous drugs, and moved on to the presumption under s 37(da) to establish trafficking, based upon the presumed possession. This direction infringed the rule against presumption upon presumption in *Muhammad bin Hassan* (see p 217E–F); *Muhammad bin Hassan v Public Prosecutor* [1998] MLJ 273 followed.

[Bahasa Malaysia summary

Perayu telah disabit dan dihukum mati oleh Mahkamah Tinggi kerana mengedar dadah di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Beliau telah merayu terhadap sabitan tersebut. Peguam bagi pihak perayu telah membidas sabitan tersebut atas tiga alasan. Berhubung alasan pertama, peguam mengadu bahawa ahli kimia tidak merujuk kepada berat sampel-sampel yang beliau ambil bagi tujuan menjalankan analisa kualitatif ke atas bahan yang dipersoalkan. Alasan kedua adalah berhubung kebolehterimaan suatu pernyataan yang dikatakan telah dibuat oleh perayu sejurus selepas didekati dan ditegur oleh pihak polis. Pihak pendakwaan mengatakan bahawa sejurus selepas didekati dan ditegur oleh pihak polis dan bungkusan-bungkusan yang mengandungi dadah diambil daripada milik beliau, perayu melutut di kaki seorang pegawai polis (PW3), menangis, memohon pertolongan dan menyatakan bahawa bungkusan-bungkusan tersebut bukan milik beliau. Hakim perbicaraan menerima keterangan ini. Perayu mengatakan ia adalah satu kekhilafan hakim perbicaraan. Pihak pendakwaan, dalam jawapannya, berhujah bahawa PW3 didapati adalah seorang saksi yang boleh dipercayai. Ini adalah melalui pemerhatian tingkah laku beliau. Berhubung alasan ketiga, peguam berhujah bahawa hakim perbicaraan terkhilaf dengan mengandaikan milikan tersebut di bawah s 37(d) Akta tersebut untuk membuktikan andaian pengedaran di bawah s 37(da).

Diputuskan, mengenepikan sabitan di bawah s 39B dan menggantikan satu sabitan di bawah s 12(2) yang boleh dihukum di bawah s 39A(2) Akta tersebut:

(1) Alasan pertama rayuan tersebut tiada merit kerana keterangan tersebut dengan mencukupi telah membuktikan melampaui keraguan munasabah bahawa bagi tujuan analisis, satu sampel

yang memadai telah diambil daripada bahan yang dipersoalkan bagi tujuan membuktikan bahawa ia memang heroin dan monoacetylmorfin (lihat ms 214E). A

(2) PW3 tidak merujuk kepada pernyataan yang dikatakan telah dibuat oleh perayu dalam apa-apa dokumen. Beliau tidak menyebutnya dalam laporan polis beliau atau kepada ketua beliau. Keterangan ini oleh PW3 adalah kali pertama. Ia adalah wajib untuk hakim perbicaraan meneliti pernyataan sedemikian dengan hati-hati. Walaupun timbalan pendakwa raya memohon untuk mengekalkan perkara kebolehterimaan hakim perbicaraan dengan menunjukkan bahawa hakim perbicaraan telah mendapati PW3 seorang saksi yang boleh dipercayai melalui pemerhatian tingkah laku beliau, tanggapan berhubung tingkah laku seorang saksi perlu diuji secara kritikal dengan keseluruhan keterangan beliau (saksi tersebut). Tingkah laku bukan selalunya kayu ukuran akan kebenaran. Ia hanya satu bahan untuk tiba ke satu penemuan kebolehpercayaan (lihat ms 214G–H, 215B–D); *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 diikut. B C D

(3) Tiada di mana-mana dalam penghakiman beliau yang hakim perbicaraan sendiri telah memberi amaran tentang perlunya meneliti dengan hati-hati pendedahan pertama yang dibuat dalam kes semasa. Walaupun keterangan boleh diterima secara teknikal kesannya yang memudaratkan lebih berat daripada nilai probatifnya. Keterangan tersebut boleh diterima secara teknikalnya kerana berdasarkan fakta-fakta, ianya adalah susah, jika tidak berkemungkin, bagi PW3 memberikan amaran kepada perayu sebelum beliau membuat pernyataan yang dipersoalkan, dengan mengandaikan bahawa perayu ditangkap pada masa matan dan oleh itu berhak terhadap satu amaran di bawah s 37A Akta tersebut (lihat ms 215D–F). E F

(4) Hakim perbicaraan mempunyai budi bicara untuk tidak memasukkan pernyataan yang dipersoalkan atas alasan bahawa kesannya yang memudaratkan lebih berat daripada nilai probatifnya (lihat ms 215F–G); *Noor Mohammad v R* [1949] AC 182 dan *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 diikut. Setelah meneliti penghakiman tersebut, Mahkamah Rayuan tidak menjumpai jenis analisis yang dinyatakan dalam *Tengku Mahmood v Public Prosecutor*. Mahkamah Rayuan juga tidak dapat melihat apa-apa arahan daripada hakim perbicaraan ke atas diri beliau di mana beliau telah mengutarakan perkara tersebut dan sebab-sebab untuk melaksanakan budi bicara beliau dalam apa-apa cara tertentu (lihat ms 216C–D). G H

(5) Dalam kes semasa, tujuan keterangan tersebut dipohon untuk dimasukkan adalah untuk membuktikan bahawa perayu mengetahui bahawa bungkusan-bungkusan yang beliau miliki mengandungi dadah berbahaya. Terdapat keterangan yang banyak untuk menggunakan andaian di bawah s 37(d) Akta I

tersebut dan walaupun tanpa bantuan andaian tersebut, pihak pendakwaan masih boleh membuktikan milikan dengan mudah. Oleh itu walaupun pernyataan tersebut boleh diterima secara teknikal, tujuan ia dipohon untuk dimasukkan tidak begitu berkesan memandangkan keterangan lain. Oleh yang demikian, ini adalah satu kes yang sesuai di mana hakim perbicaraan sepatutnya menggunakan budi bicara yang diberikan kepada beliau dan tidak memasukkan pernyataan tersebut kerana ianya bertentangan dengan keadilan berdasarkan fakta-fakta tersebut (lihat ms 216D–F).

(6) Ia adalah jelas daripada penghakiman tersebut bahawa hakim perbicaraan telah mengarahkan minda beliau kepada andaian di bawah s 37(d) dengan membuktikan milikan oleh perayu ke atas dadah berbahaya tersebut, dan beralih kepada andaian di bawah s 37(da) untuk membuktikan pengedaran, berdasarkan andaian milikan. Arahan ini melanggar peraturan terhadap andaian ke atas andaian dalam *Muhammad bin Hassan* (lihat ms 217E–F); *Muhammad bin Hassan v Public Prosecutor* [1998] MLJ 273 diikut.]

Notes

For cases on s 39B of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 126–149.

For cases on presumption of drug trafficking, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1840–1843.

For cases on the admissibility of statements, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2145–2152.

Cases referred to

Goi Ching Ang v PP [1999] 1 MLJ 507 (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
Noor Mohammad v R [1949] AC 182 (folld)
Tengku Mahmood v PP [1974] 1 MLJ 110 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 37A, 39A(2), (a), 39B
Evidence Act 1950 s 159

Appeal from: Criminal Trial No 45–5–99 (High Court, Kuala Lumpur)

Karpal Singh (*M Sathia* with him) (*Karpal Singh & Co*) for the appellant.
Nik Ahmad Marzuki bin Nik Mohamad (Deputy Public Prosecutor) (Attorney-General's Chambers) for the respondent.

Gopal Sri Ram JCA: This is the judgment of the court.

On 23 June 1998 at 4.35pm, a police party led by PW3 laid an ambush at Jalan Jambu Golok, Taman City, Jalan Kuching, Kuala Lumpur. They

were acting on certain information which they had earlier received. Later, the appellant, who was carrying two packages under his arm, came to the scene. He went to a telephone booth where he made two telephone calls. The appellant was apprehended by the police. The two packages he was carrying with him were taken away.

Their contents were sent for chemical analysis. This revealed that the packages contained 11.8g of heroin and 5.2g of monoacetylmorphine. The appellant was subsequently charged for the offence of trafficking under s 39B of the Dangerous Drugs Act 1952 ('the Act'). He was tried on the charge, found guilty, convicted and the mandatory death penalty was imposed upon him. The present appeal is directed against that conviction.

Mr Karpal Singh who appeared for the appellant, had raised grounds which, he submits, amounted to serious misdirection on the part of the trial judge. The first relates to the evidence of the chemist. The second is directed to the admissibility of a statement allegedly made by the appellant at the scene of the incident. The third relates to what has come to be known as the rule against presumption upon presumption or the rule in *Muhammad bin Hassan* (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).

As to the first ground, the complaint here is that PW2, the chemist, did not advert to the weight of the samples he took for purposes of carrying out his qualitative analysis of the substance in question. We have scrutinized the evidence of the chemist with care and we do not find any merit in the complaint made by counsel. The evidence sufficiently establishes beyond a reasonable doubt that for the purpose of analysis, a sufficient sample was taken of the substance in question in order to establish that it was indeed heroin and monoacetylmorphine, respectively.

As to the second ground, a brief recital of the relevant facts is necessary to appreciate the point that is sought to be made. Now it is the prosecution's case that immediately upon being accosted by the police and the packages being removed from his possession, the appellant fell at PW3's feet, wept, pleaded for help and said that the packages did not belong to him. The learned judge admitted this evidence. It has been submitted that he did so in error.

It is significant, and this was noted by the learned judge, that PW3 had not referred to this alleged statement by the appellant in any documents whatsoever. He had admittedly not made mention of it in his police report. Neither had he mentioned it to his immediate superior. As pointed out by our learned brother Abdul Kadir Sulaiman JCA in the course of argument and accepted by the learned deputy who had responded to this appeal, this revelation by PW3 was of first impression. In other words, it was at the trial for the very first time that anyone was hearing about this alleged statement. In our judgment, it was incumbent upon the learned trial judge to have approached such statement with utmost caution. That is not to say that PW3 is not an honest and truthful witness. He might be perfectly truthful, yet he might have been confusing this case with another under his investigation. A contemporaneous note made by him either in his

investigation diary or in the police report would have been of considerable evidential value. It could have been used by him to refresh his memory under s 159 of the Evidence Act 1950. It may have satisfied a tribunal trying the case that he was indeed accurate in his recollection of the events. But that was not the case here.

The learned deputy had valiantly sought to sustain the learned judge's point on admissibility by pointing out that the learned judge had indeed found PW3 a credible witness through observation of his demeanor. To that submission, we would cite in answer the following passage in the judgment of Raja Azlan Shah FJ (as he then was) in *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110, at p 110:

> As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v Public Prosecutor* [1949] MLJ 88, 89 in 1948. In that case it was held that impression as to demeanor of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanor is not always the touchstone of truth. It is only one ingredient in arriving at a finding of credibility.

Nowhere in his judgment has the learned trial judge warned himself of the necessity of approaching with caution such a first disclosure as was made in the present instance. The learned deputy has frankly conceded this. The upshot is that while the evidence in question may be technically admissible (and we will say in a moment why) its prejudicial effect far outweighs its probative value. It was technically admissible because in the particular circumstances obtaining in this case, it was difficult, if not impossible for PW3 to have administered a caution to the appellant before the latter made the impugned statement. And for the present purpose, we are prepared to assume that the appellant was under arrest at the material time and therefore entitled to a caution under s 37A of the Act.

To return to the point we were making, the learned judge had a discretion in the circumstances to exclude the impugned statement on the ground that its prejudicial effect outweighed its probative value. In support of this proposition we rely on the following passage of Lord du Parcq in *Noor Mohammad v R* [1949] AC 182, at p 192:

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

The above dictum by Lord du Parcq was applied by the Federal Court in *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 where at p 527 Chong Siew Fai CJ (Sabah and Sarawak) said:

> In short, since the learned trial judge in the instant case under appeal had found that the s 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.
>
> For the aforementioned reasons, we are of the view that the s 27 information of the appellant ought to have been excluded from evidence in the discretion of the court which was not exercised by the trial judge.

Now we have scrutinized the judgment with care and no where in it have we found the kind of analysis as stated in *Tengku Mahmood.* Neither are we able to discern any in the judgment, a direction by the learned judge unto himself that he had addressed the matter and the reasons for exercising his discretion in any particular way. But that still leaves the question whether the statement was rightly admitted in the present case.

Now in the instant case, the purpose for which the evidence was sought to be admitted was to prove that the appellant knew that the packages he held contained a dangerous drug. Here the learned deputy has conceded that there was abundant evidence to invoke the presumption under s 37(d) of the Act. He says, and we agree with him, that even without the aid of the presumption, the prosecution could still easily prove possession.

It follows therefore, that although the statement was technically admissible, the purpose for which it was sought to be admitted was of little consequence in the light of the other evidence. Accordingly, in our judgment, this was an appropriate case where the learned judge should have exercised his discretion vested in him and excluded the statement as being contrary to justice on the facts of this particular case.

That brings us to the third point. The submission made before us relates to the following passage made in the judgment of the learned judge which reads as follows:

> It is clear from the cross-examination and the submission that no reasonable doubt has been raised in the prosecution case, in which it was clearly shown by direct evidence that the accused had:
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> a by inference by his own conduct (*Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, *KJ Barlow v Public Prosecutor; BG Chambers v Public Prosecutor* [1986] 2 MLJ 104), he knew of the nature of the thing in the envelopes, that they were dangerous drugs shows knowledge (by inference: *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237) and possession of the dangerous drugs; and
>
> b from the amount, manner of packaging, absence of any evidence that the said dangerous drugs were for his own use, and the circumstances he went directly to the public telephone booth, made calls, and without

A having made conversation, proceeded forth suggests carrying or delivering within the meaning of trafficking in section 2 of the Dangerous Drugs Act (see *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162, *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64):

B and supported by the presumption either:

i the fact he had custody and control of the two envelopes, he is presumed, until the contrary is proved, to have possession and knew of the nature of the dangerous drugs contained therein; or alternatively

ii by the quantity of 17g of heroin and monoacetylmorphine, he is presumed, until the contrary is proved, to be trafficking in the said C dangerous drugs,

the court therefore finds that the prosecution had made out a prima facie case in accordance with section 180(i) of the Criminal Procedure Code and in accordance with section 180(iii) thereof calls upon the accused to enter upon his defence.

D Counsel for the appellant submitted that this passage is clearly open to the interpretation that the learned judge found the appellant guilty of trafficking by first having resort to 37(d) of the Act and immediately thereafter having recourse to the presumption under s 37(da) thereof. The learned deputy on the other hand submits that nowhere in the passage in question has the learned judge taken that position. With respect, we are unable to agree with E this response.

It is plain, even from a cursory reading of the foregoing passage in his judgment that the learned judge was indeed directing his mind to the presumption under s 37(d) as establishing possession by the appellant of the dangerous drugs in question and then immediately moving on to the F presumption under s 37(da) to establish trafficking based upon the presumed possession. The latter part of his judgment in the passage already quoted cannot be explained in any other way. This direction actually infringes the rule in *Muhammad bin Hassan*. It is a case to which we have referred often enough. It is a case that states a principle with which the criminal Bar is so well versed that we find it unnecessary to restate.

G For the reasons already given, this is not a case in which a conviction for trafficking under s 39B of the Act may be safely sustained. We would accordingly set aside the conviction under s 39B thereof and substitute it with one under s 12(2) punishable under s 39A(2) of the Act.

H Having heard arguments on sentence, we are satisfied that in the public interest a deterrent sentence should be imposed on the appellant.

We have taken into account all that Mr Karpal Singh has put forward by way of mitigation. Our learned brother Alauddin JCA has drawn our attention to s 39A(2)(a) of the Act which refers to a minimum of 5g as the trigger for the operation of that section. We are therefore unable to agree I with counsel for the appellant that he was carrying a mere 2g more than the trigger point. A more accurate statement would be he was carrying more than three times the trigger point.

In the circumstances, we would therefore impose a sentence of 18 years' from the date of arrest. The appellant must also suffer a minimum of ten strokes of the rotan.

Conviction under s 39B set aside and substituted by a conviction under s 39A(2) of the Act.

Reported by Andrew Christopher Simon